

² *Compatibility between Cable Systems and Consumer Electronics Equipment, Notice of Proposed Rulemaking*, PP Docket No. 00-67, FCC 00-137, released April 14, 2000.

business and to propose and discuss alternatives.

1. The IRFA Does Not Describe the Proposed Rules' Impact on Small Entities.

The Commission's IRFA explains that "[l]abeling rules would require all manufacturers, small and large, to adhere to certain terminology in the descriptive labels that they attach to the receivers that they produce" and that "[r]egulations relating to copy protection licensing technology could affect the terms and conditions under which manufacturers, small and large, acquire copy protection technology licenses."³ The Commission indicates that the impact of the rules would be minimal but otherwise does not explain the impact.⁴ In fact, the Commission requests comment on whether its proposed rules would burden small businesses.⁵

The RFA requires the Commission to discuss the significant economic impact its proposal would have on small entities.⁶ But rather than discuss the rules' impact, the Commission calls the impact "minimal", without offering much explanation or support.⁷ The Commission points out that some licensing of proprietary technology would be necessary even absent new rules, but concedes that the proposed rules "may affect the terms under which manufacturers acquire licenses".⁸ Thus, by affecting how a business would license proprietary technology, the rules would have some impact on businesses. The Commission's IRFA should

³ *NPRM, Appendix A*, page A-2.

⁴ In this regard, even if the Commission had certified that its rules would have no significant impact on a substantial number of small entities, the Commission would have had to provide a factual basis for its conclusion. *See* 5 U.S.C. § 605. In this case, the Commission has not certified that no significant impact would occur, yet characterizes the impact as minimal. The Commission fails to state the rationale behind this seeming contradiction.

⁵ The Commission states, "This proceeding seeks comment on whether the burden, if any, of compliance with rules adopted pursuant to this *Notice* could be mitigated for small entities." *NPRM, Appendix A*, page A-2.

⁶ *See* 5 U.S.C. § 603.

⁷ The Commission states, "The proposed actions may require manufacturers of DTV equipment to adhere to some labeling standards. Moreover, the proposed actions may affect the terms under which manufacturers acquire licenses to utilize certain copy protection technology in their products. We believe that the impact of any rules that might be adopted pursuant to this *Notice* would be minimal. We seek comment on this." *NPRM, Appendix A*, page A-4. The Commission also notes that its rules would benefit consumers. *See NPRM, Appendix A*, page A-5. While this is an important objective, it does not relieve the Commission of the duty to study the impact on small business.

⁸ *NPRM, Appendix A*, page A-4.

explain this impact.

The Commission also asserts that its labeling rules would have a minimal impact, because labeling would be standardized, costs would be spread over sufficient quantities of goods as to be insubstantial, and manufacturers could pass costs on to their subscribers. But this ignores the differences in output or customer base that may exist between a small company and a large company. A business with less output or fewer customers might find its per unit costs are higher. The Commission should explore any such potential cost discrepancies based on business size, not simply dismiss them as minimal.

2. The IRFA Does Not Propose Alternatives to Reduce the Impact on Small Entities.

The Commission acknowledges that the RFA requires it to describe significant alternatives that would minimize the impact of the proposed rules on small business yet still accomplish the Commission's stated objectives.⁹ But the Commission fails to describe any such alternatives. The Commission rejects an exemption for small businesses, because this would defeat the basic purpose of the proposed rules. But the RFA requires an agency to consider alternatives that are consistent with its regulatory aim. If exemption would eviscerate labeling and licensing rules, then the Commission should consider other alternatives, which might minimize impact and permit the Commission to achieve its stated goals of protecting consumers in their purchase of cable-ready digital equipment, promoting digital transition, and assuring equipment compatibility.

The Commission does not appear to consider any alternatives that might mitigate the impact of the rules and serve its regulatory objectives. Such alternatives could include phasing-in new requirements for small businesses, which would assure accurate and simple labeling, yet

⁹ See *NPRM, Appendix A*, page A-4 - A-5.

afford small manufactures an opportunity to absorb any associated costs.

The Commission welcomes comment from parties that may disagree with the Commission's conclusions. But the RFA requires the Commission to specifically discuss proposed alternatives, not to invite commenting parties to conduct an analysis of small business impact that the Commission must itself conduct.¹⁰ The Commission cannot pass this responsibility on to the public.

The Commission's approach would exclude aspects of its decision-making from public comment. If the Commission accepts and adopts an alternative proposed by a commenting party, one never discussed publicly in the *NPRM*, the Commission deprives affected parties of the opportunity to review the alternative and comment on it. Similarly, if a commenting party suggests an alternative that the Commission chooses not to adopt in its final rules, the Commission denies the public the ability to review and comment on the Commission's decision and its rationale for rejecting the alternative approach. The public may read in the final order that the Commission reviewed and rejected a suggested approach, but at that stage it would be too late for public comment on the suggested approach. The Commission cannot stray significantly from its proposed rule when it adopts a final rule.¹¹ If it does so, it denies the public the benefits of notice and comment rulemaking. The Commission must set forth its proposals and its reasons for preferring one approach or another, and elicit the public's response. In this regard, the requirements of the RFA are not different than any other element of the Commission's decision-making process.

¹⁰ See 5 U.S.C. § 603(c). The RFA enumerates four alternatives: (1) different compliance requirements or timetables, (2) clarification, consolidation, or simplification of compliance requirements, (3) use of performance rather than design standards, and (4) exemption – either in whole or in part – for small entities. See 5 U.S.C. § 603(c)(1)-(4).

¹¹ See *Northwest Mining Association v. Babbitt et al.*, 5 F. Supp. 2d 9 (D.D.C. 1998).

Conclusion

The Commission proposes important rules designed to protect consumers and assure equipment compatibility in a digital environment. But the Commission does not adequately discuss the impact of the proposed rules on small business, nor does it discuss alternatives that would minimize the impact and serve the objectives of the rulemaking. Absent a description of the Commission's rationale, parties will be unable to prepare informed comments on the Commission's proposals.

The Commission has established a pattern of sparse IRFAs, in which it acknowledges that a proposal will burden small business but fails to explain how. The Commission regularly declines to suggest and discuss alternatives, as if this were within its discretion and not a requirement of the law. The Commission routinely asks the public to supply the analysis underlying a bare-bones IRFA. The Commission appears to pay lip service to the RFA, to treat its requirements as an afterthought.

The RFA does not establish a procedural routine, comparable to dotting Is and crossing Ts. Rather, the RFA seeks to alter the way agencies make rules, to get agencies to consider the impact of their rules on small business, at the policy-making level. The RFA recognizes that regulatory burdens fall disparately on small business and attempts to establish a level playing field. If fairness to small business is central to policy-making at the Commission, it is a very well kept secret.

The Commission should prepare a supplemental regulatory flexibility analysis, to estimate the rules' impact on small entities. If the Commission concludes, as it seems inclined, that the impact would be minimal, it should explain why. This should be based on analysis, not

general belief. If the rules would impose a significant impact on a substantial number of small entities, the Commission must propose and discuss alternatives.

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